



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: National Council of Fishing Vessel Safety and Insurance

File: B-239303

Date: August 15, 1990

Thor Lassen, for the protester.
Richard L. Moorhouse, Esq., and Richard O. Duvall, Esq.,
Dunnells, Duvall & Porter, for Canadian Commercial
Corporation, an interested party.
Michael R. Nevarez, Esq., United States Coast Guard,
Department of Transportation, for the agency.
John Formica, Esq., and John Brosnan, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Argument that a matter raised during discussions is inconsistent with solicitation's evaluation criteria is untimely when not filed until after award.
2. Protest that agency failed to account for alleged financial instability of subcontractor in evaluating awardee's proposal is denied where the solicitation does not contain any evaluation criteria relating to the financial condition of an offeror or its subcontractors.
3. Protest challenging agency's affirmative determination of responsibility is dismissed where the protester does not allege nor is there any evidence in the record of fraud or bad faith on the part of procurement officials.

DECISION

The National Council of Fishing Vessel Safety and Insurance protests the award of a cost-plus-fixed-fee contract to the Canadian Commercial Corporation (CCC), to be performed by its subcontractor Wartsila Marine, Inc., under request for proposals (RFP) No. DTCG39-89-R-80845, issued by the Coast Guard for a study of fishing vessel stability. The Council contends that its proposal was improperly evaluated as to cost and that the agency failed to account for the alleged

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financial instability of Wartsila and a potential second-tier subcontractor in evaluating the CCC/Wartsila proposal.

We deny the protest in part and dismiss it in part.

The RFP specified that the work is to be performed in two phases, with phase one consisting of the compilation of available background information bearing on fishing vessel stability, and phase two requiring, after review of this information by the agency, the testing of fishing vessel models in order to evaluate vessel stability standards. The solicitation provided that proposals should contain, in relevant part, an executive summary, a technical proposal, a business management proposal, and a cost proposal, and stated that the cost proposal was to be separate, and that it would be used to judge the offeror's financial responsibility and the reasonableness of the proposed costs. The RFP informed offerors that the factors to be considered in evaluating proposals, in descending order of importance, were: (1) corporate background and experience; (2) personnel; (3) proposed technical approach; (4) planning, organization and completeness, and; (5) cost.

The Council and CCC/Wartsila submitted the only two proposals received in response to the solicitation, priced respectively at \$250,855 and \$309,356. Both proposals were included in the competitive range.

In its proposal, the protester stated that it would conduct the fishing vessel model testing portion of the project at the United States Navy's David Taylor Research Center and explained that its proposal, which did not include any costs for the use of the Center, was based on its assumption that the facility would be made available "through an interagency agreement between the U.S. Coast Guard and the U.S. Navy."

Discussions were held, and the protester was informed by the Coast Guard that the agency had no agreement for the use of the Center, and that the protester's proposal should show all costs involved in performing the project.

Best and final offers (BAFOs) were subsequently requested and received from the Council and CCC/Wartsila. After reviewing these BAFOs, the agency determined that another round of discussions was needed. Further discussions were held, and BAFOs were again requested and received from both firms. The Council proposed a cost of \$348,703, an increase of more than \$90,000. The record shows that \$70,000 of this increase resulted from the addition of the estimated cost for the protester's use of the Center. CCC/Wartsila

proposed an estimated cost of \$309,368. The proposals were evaluated, and award was subsequently made to CCC/Wartsila based primarily upon its lower estimated costs.

The protester first argues that its cost proposal was improperly evaluated. The protester predicates this argument on its assertion that its use of the Center during the model testing phase of the project will not cost the agency anything, because the government's cost of operating the Center is "fixed." On this basis, and because the solicitation provides that proposals will be evaluated as to their "cost to the [g]overnment," the protester contends that the agency was in error when it informed the protester during discussions that its proposal should reflect the costs associated with its use of the Center. Thus, the protester concludes that despite its final cost estimate of \$348,703, its costs should be evaluated as \$278,703, because this latter figure represents the actual cost of the protester's proposal to the government.

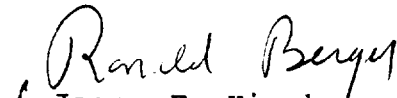
The Council's arguments regarding the need for it to include, in its cost proposal the costs associated with the use of the Center are untimely. The Coast Guard, by informing the protester during discussions that it was that firm's responsibility to make its own arrangements for a testing facility because the agency did not have cost-free use of the Center and by telling the firm that its proposal should show all costs involved in the performance of the contract, put the protester on notice that the cost of its use of the Center would be considered in the evaluation of its proposal. Therefore, the Council, if it disagreed with that approach, should have protested at that time rather than wait until the selection of a competitor. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990); Development Alternatives, Inc., B-235663, Sept. 29, 1989, 89-2 CPD ¶ 296.

In any event, the agency reports that the Center is operated as an industrial fund activity whose funding is obtained from fees paid by its users, including other government agencies. Thus, the Center's costs are not "fixed" as the protester asserts, but are defrayed by fees from its users. In view of this and considering the fact that the agency states that it does not have a no cost agreement to use the Center, we simply fail to see the basis for the protester's argument that the cost of using the Center should be excluded from its cost estimate.

The protester next argues that the agency failed to account for the alleged financial instability of Wartsila and a potential second-tier subcontractor, Arctec Offshore Corporation, in evaluating CCC/Wartsila's proposal. It contends that had the agency taken the alleged financial instability of these firms into account, CCC/Wartsila's proposal would have received a lower evaluation score that would have affected the outcome of the competition.

We disagree. While in appropriate circumstances, and where the solicitation so apprises offerors, financial condition can be used to assess the relative merits of a proposal, E.H. White & Co., B-227122.3; B-227122.4, July 13, 1988, 88-2 CPD ¶ 41, the solicitation here did not contain any evaluation criteria relating to the financial condition of an offeror or any proposed subcontractors. However, the solicitation did provide that information included in an offeror's cost proposal would be used to determine financial responsibility. To the extent that the protester is challenging the agency's affirmative determination of CCC/Wartsila's responsibility, we generally do not review an affirmative responsibility determination absent a showing of possible fraud or bad faith on the part of procurement officials. 4 C.F.R. § 21.3(m)(5); Laketon Refining Corp.; Ashland Petroleum Co., B-235977.2; B-235977.3, Jan. 4, 1990, 90-1 CPD ¶ 10. The protester has not alleged fraud or bad faith, nor is there any evidence in the record of fraud or bad faith on the part of procurement officials.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel